POPULAR CONTROL UNDER THE RECALL

By H. S. Gilbertson,
Assistant Secretary of The Short Ballot Organization.

The recall is in need of a more exact definition than current thought affords. To regard it merely as a new and clever way of "getting at" a public officer is unsatisfactory. The recall is not a "device" in the flippant sense in which its opponents of political reform use that term.

Aside from any question of its inherent merit or its practical workings, the recall expresses a new relationship between representative and constituent. It has no exact parallel in our previous institutions; no elective public officer in this country was ever before relieved of his authority and emoluments without a legal process, before the end of a definite term. But now, public office subject to the recall becomes a public trust in a more practical sense than was true when the holder was able to cut loose from his constituents and go merrily on his way with the comforting thought that he would have to render an account of his stewardship only after the lapse of a specified period. The recall, furthermore, recognizes a new kind of un-officerlike conduct: it may go into action not so much because the officer is guilty of statutory crimes as because of behavior unbecoming a representative.

For the following definitions we are indebted to the judiciary of several states. The courts of California, the birth-place of the recall, have been especially constructive in affirming its validity. The following from the opinion in *Good* v. *Common Council of San Diego* (5 Cal. App. 265, 90. Pac. 44) is worth quoting:

> Responsible government is the very foundation of the republican system, and there appears no reason why a representative should not be made to retire at any time, at the request of the people, as well as the end of a fixed period. This is not deemed incompatible with a republican form of government in France and several of the South American states. It is similar in principle and application to the customs or rules which make the ministry, the real government of England answerable at all times for its failure to meet the approval of the electorate of that country on some measure or question of policy.

Note also the liberal construction in the two opinions, involved in the recall of Mayor Gill, of Seattle:

> We must not hunt for obscure reasons to thwart the will of the people. This court cannot pass upon all the intricate questions involved on the spur of the moment. Where there is any doubt in the court's mind as to the charter provisions, it ought to be decided in favor of the free expression of popular will. It is suggested by the plaintiff that the expense of such recall provisions should be avoided in view of the questions involved and uncertainty as to legal procedure, but the court cannot consider the matter of expense that is authorized by law. The people have adopted the charter amendment recognizing the expense and it is not for the court to say no.

These are the words of Judge Albertson of one of the local state courts. Judge Hanford, in affirming this decision in the United States District Court of Appeals was equally liberal in the construction of the law involved:

> It is a matter of right or wrong between these parties with the plaintiff only the payment of his tax is involved. The defendant stands here for the orderly conduct of an election authorized under the laws of the state. It is a matter that affects the whole community. The court should be very slow in tying the hands of the officers of the city in a case of this kind.

In affirming the validity of the recall provision in the Dallas Charter, Chief Justice Brown of the Supreme Court of Texas said:

> We are unable to see from our viewpoint how it can be that a larger measure of sovereignty committed to the people by this method of government and a more certain means of securing a proper representation in any way militates against its character as a republican form of government and that it is thereby rendered in any sense obnoxious to the provisions of the Constitution of the United States.

Eastern judges may in future be less generous. But the trend of judicial opinion thus far, is in favor of this form of extended popular control. The recall, to take the point of view of the courts, is thoroughly consistent with the republican form of government.

This widening of the functions of citizenship is accomplished, obviously by pruning away some of the legal protection which public servants have heretofore enjoyed. Public office in America has never been conceived as property as in Europe; and yet the process whereby the incumbent could be removed was not unlike divesting a property holder of his title. But the recall frankly puts

tenure of office on a political basis, at the mercy of political considerations. It is in fact this very insecurity of tenure which is the chief element in the recall. Or, rather, there is a certain insecurity that is essential to the responsiveness of action which the recall seeks to achieve.

Herein, then, arises a practical question: how to preserve the essential securities of public office when the stereotyped processes of the law give way to the more uncertain methods of popular action. Unless this transition is satisfactorily made, the recall is justly to be held accountable for some of the perils which some of its opponents see in it. It would be a poor bargain, if public office were to be cheapened or to lose dignity through the change.

"Due process of law" stipulates for a fair and public trial, definite charges, and a strict construction of the law in favor of the accused. The popular tribunal obviously cannot guarantee all these things with the same degree of surety. It will do well if it only adheres to the rudiments of "fair play," a term which is easily understood by average citizens.

The measure of justice meted out to officials indicted officially at the bar of public opinion can be determined best by reference to the history of recall campaigns. But, first, let us examine into the measure of *legal* immunity which existing laws afford. Charter provisions respecting the recall are framed with a view to putting the electorate in control only within certain well defined limits. The roll call of the electorate may be taken only on the initiative of a substantial percentage of the number of persons voting at the last municipal election for the highest officer of the city. This percentage varies from fifteen to thirty-five. The Illinois requirement of fifty-five per cent being, of course nugatory. In many charters a period of grace of from three months to one year is provided for, in which the policies and public acts of the officer in question have time to mature. Every charter provides for a substantial lapse of time between the filing of the recall petition and the election, which gives an opportunity for a thorough hearing of the charge. A general statement of the reasons for removal usually accompanies the petition. These requirements parallel, essentially, the immunities of the law but are many degrees more flexible. Beyond this, it rests with the good will and temper of the people how the officer

will fare. The history of the institution, if its brief career may be called a history, is the only good answer to this question.

Los Angeles, the first city to adopt the idea, has made practical use of it on three occasions. In the first instance a councilman named Davenport was subjected to proceedings in his ward on account of his vote on a printing contract, which brought down the wrath of the labor unions. He was also alleged to have had too close relations to liquor interests, and to have taken money for a vote to permit the establishment of an offensive slaughter house in a residence district. The first election in this case was thrown out on technical grounds, but the councilman was voted out of office a second time and the election sustained. Later, in the same city the council, in the face of an overwhelming protest, voted to give away a valuable franchise in the Los Angeles River bed. Preparations for action under the recall were made, but before the petitions were in the field the councilmen realized the hopelessness of their position and nullified the franchise. The third and most important Los Angeles case centered mainly around questions of police administration. This was no sudden movement. Revelations were ripening for at least a year and were based upon a grand jury investigation, charging the mayor with complicity in the lax enforcement of the vice laws. Mayor Harper was recalled after an exciting campaign in March, 1909.

In 1906 a councilman named Reynolds in the City of San Diego, California, was made the subject of a recall petition on the ground that he had voted for a certain ordinance regulating the sale of liquors, and that he had repeatedly voted to disregard petitions to refer ordinances, which were filed in conformity with the provisions of the charter, to a vote of the people. The city council in this instance, without consulting the city attorney, ignored the recall petition and covered their negligence with a plea that the provisions of the charter which bore on the recall were unconstitutional. Legal proceedings continued for many months until three days before the end of the officer's term. No vote was ever taken on the matter.

In the movement to recall the mayor of Seattle, the vice issue was again prominent. The personality of this officer and his attitude toward the public were offensive to the point of insolence. The election, in which the women of the city participated, resulted in his recall, together with the consequent removal of an obnoxious

appointee at the head of the police force. In Tacoma, where the mayor and two members of the council were removed after a campaign of several weeks, the issues were various but may be summed up as the general lack of sympathy on the part of the officials with the spirit of the new charter. Mayor Fawcett, for example, refused, point-blank to enforce the civil service laws. In Dallas, Texas, there have been two recall elections directed at recalcitrant members of the Board of Education. The original trouble arose over the removal of two exceedingly popular members of the teaching force without stated cause. Here the percentage of voters required on recall petitions is thirty-five per cent, the highest of any except under the Illinois commission government law. In Huron, South Dakota, the recall issue seems to have arisen over a question of the tax rate. The mayor and council, however, were sustained.

These are the principal cases available for analysis. It should be noted that neither Seattle, Los Angeles, nor San Diego were, at time of the recall troubles, operating under commission government charters. Frequent attempts have been made in a number of other cities, but have not met with sufficient success to bring the matters to a vote of the people.

Even from this meagre statement it will be seen that recall proceedings are not apt to be undertaken seriously without due consideration; in practically every case that has come under our observation, there has been extreme provocation to removal.

A suggestive fact indicating the substantial nature of the charges is the character of the defense put up. In every important case thus far, technicalities loom up large. The Seattle mayor frankly confessed his desire to delay proceedings by imposing legal obstacles. In the first Los Angeles case it was a technical objection to the first election which had to be surmounted. This procedure has been repeated by the defense in nearly every case. The public, on the other hand, has uniformly seemed disposed to open the field for a free discussion of the merits of both sides.

One of the bulwarks of individual civil liberty in Anglo Saxon countries is a public trial. In carrying out the analogy of a recall campaign to a judicial trial it may be said that the salient feature of publicity is preserved in a striking degree. Publicity is achieved under conditions of peculiar advantage. The basic simplicity of the short ballot—a single uncomplicated issue—is

there personified in the candidate under examination. It is pitiless in bringing out the hidden works of darkness. Thus, in the mayoralty campaigns cited above, the parties to both sides of the contest utilized every available channel for reaching the public ear. Every hall was rented; every available newspaper column was filled. The personal element is unusually strong in that the individual is "under fire." The issues are interesting—there is a special occasion for a recall election where a regular election may be called for by nothing more than the recurrence of election time.

In fine, if, as has been suggested, the merit of the recall rests not upon theoretical or formal, but upon practical considerations, it may be said thus far to have made good its right to endure. Has it proved itself an incubus, weighing against the progress of the cities which have adopted it as a part of their political machinery? The progressive spirit and the records of varied achievements, in the cities under the commission plan seem to afford an emphatic negative to this query, for the larger proportion of these cities recognize the recall, not as an instrument of negation for frequent use, but as a very present help in time of trouble, or, as Woodrow Wilson puts it, "the gun behind the door."